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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 851

WHITELIGHT PRODUCTS DIVISION OF WHITE METAL ROLLING AND STAMPING CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	PAGE
PETITION	1
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
	see 35a-39a
STATEMENT	3
BASIS OF JURISDICTION OF FEDERAL COURTS	5
REASONS FOR GRANTING THE WRIT	6
1. The decision of the Court below is in conflict with the provisions of the National Labor Relations Act	6
2. The decision of the First Circuit is in conflict with decisions of the Second Circuit	11
3. This case presents an important question of Federal labor law not previously considered by this Court	12
CONCLUSION	13
APPENDIX A	1a
Intermediate Report of the Trial Examiner	1a
Decision and Order of the National Labor Relations Board	20a

PAGE

APPENDIX B 25a

Opinion of the United States Court of Appeals for the First Circuit 25a

APPENDIX C 35a

Applicable provisions of the National Labor Relations Act 35a

TABLE OF AUTHORITIES

Cases:

Firestone Tire & Rubber Co., 76 NLRB 226 (1948) 10

Franks Bros. Co. v. NLRB, 321 U. S. 702 (1944) 6-7, 9, 13

General Box Co., 82 NLRB 678 (1949) 10

International Ladies Garment Workers Union v. NLRB, 366 U. S. 731 (1961) 9, 13

NLRB v. Adhesive Products Corp., 281 F. 2d 89 (2nd Cir. 1960) 11-12

NLRB v. Marcus Trucking Co., 286 F. 2d 583 (2nd Cir. 1961) 12

NLRB v. Philamon Laboratories, Inc., 298 F. 2d 176 (2nd Cir. 1962) 12

NLRB v. Seven-Up Bottling Co., 344 U. S. 344 (1953) 6

NLRB v. Superior Fireproof Door & Sash Co., 289 F. 2d 713 (2nd Cir. 1961) 12

Perry Coal Co. v. NLRB, 291 F. 2d 126 (7 Cir. 1961) 12

Statutes:

National Labor Relations Act ..... 2-3, 35a-39a, *passim*

Congressional Reports:

House of Representatives Committee Report No. 245, 80th Congress, First Session 10

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NATIONAL LABOR RELATIONS BOARD,

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Whitelight Products Division of White Metal Rolling and Stamping Corp. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled action on January 15, 1962.

Citation to Opinions Below

The intermediate report of the Trial Examiner and the decision and order of the National Labor Relations Board is reported in 131 NLRB No. 158 and is printed in Appendix A hereto, *infra*, p. 1a. The opinion of the United States Court of Appeals for the First Circuit is reported in 298 F. 2d 12 and is printed in Appendix B hereto, *infra*, p. 25a.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on January 15, 1962.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1) and Section 10(e) of the National Labor Relations Act, 29 USC Section 160(e).

Questions Presented

1. Is an order of the National Labor Relations Board ordering an employer to bargain with a particular union enforceable as effectuating the policies of the National Labor Relations Act where neither the employer had previously recognized the union as the collective bargaining representative for his employees nor the employees of the employer had selected the union as their collective bargaining representative at an NLRB conducted collective bargaining election?

2. Is an employer guilty of the unfair labor practice of refusing to bargain collectively where he does not bargain with a union whose only proof of majority status consists of authorization cards signed by a majority of the employer's employees in a one morning "whirlwind campaign" and where a good faith doubt of majority status exists?

Statute Involved

The National Labor Relations Act as amended, 29 USC Section 151 *et. seq.*, 49 Stat. 449 as amended, by 61 Stat. 136.

Because of the length of this Act and the inapplicability of most of the provisions thereof to the instant case we will

reprint in Appendix C hereto, *infra* p. 35a, only such portions of the Act as we deem pertinent to the consideration of the instant case.

Statement

Petitioner Whitelight Products Division of White Metal Rolling and Stamping Corp. (hereinafter referred to as the "Employer"), operates a plant in North Walpole, New Hampshire for the assemblying of various types of magnesium and aluminum ladders and other items from extruded materials manufactured and shipped from Employer's Brooklyn plant (Consolidated Joint Appendix in the court below, pages 27-28, 69-70 hereinafter referred to as CJA). By August 1960 there were twenty-four or twenty-five employees in the production and maintenance departments at the North Walpole Plant (CJA 167).

On August 15, 1960, the Employer's 3,000 ton extrusion press in its Brooklyn plant, upon which the North Walpole plant was dependent, burst its main water cylinder resulting in a complete stoppage of output from that machine (CJA 29-32). As a result of this breakdown the Employer had to revise its plans for its North Walpole plant, both because of the anticipated shortage of materials to be processed at the North Walpole plant and the necessary reallocation of the Employer's budget to pay for the repair of the Brooklyn press. This change of plans meant that the Employer had to reduce its work force in the North Walpole plant (CJA 32-34, 38-39, 73-75).

The news of the breakdown was told to at least one production employee, Mr. Arthur Fair, as well as the three supervisory employees at North Walpole (CJA 104-106). It can be presumed, because of the small, closely knit character of the North Walpole plant that news of

the breakdown quickly spread to the other production employees. This background is essential to appreciate the subsequent action of these employees.

On the night of August 16, 1960, one day after the press breakdown, one of the North Walpole plant employees, Mr. Donald Belden, met with an organizer for the United Electrical Radio and Machine Workers of America, Local 218, the charging party herein (hereinafter referred to as the "Union") (CJA 6, 13-14). The next day, August 17, 1960, Belden and one other employee obtained sixteen signed Union authorization cards from his fellow employees during the brief period between the start of work and 12:30 P.M. (CJA 18), presumably the greater number between 12 and 12:30 P.M., the lunch period.

At 12:30 Belden, the Union organizer, Mr. Hugh Harley and a hastily formed Union committee, unannounced and without previous appointment, walked into the office of the plant manager Mr. Earl Records at which time the Union demanded recognition (CJA 77). This demand was the first indication of any sort to the Employer that a union was conducting an organization drive (CJA 77).

Mr. Records told the Union that he was not in a position to give an answer to its demand at that time but that he would answer their request no later than Friday of that week—two days later (CJA 7, 19-21, 93-95). Thereafter, the Union filed a petition for an NLRB collective bargaining election. Mr. Records, true to his word, gave Mr. Harley the answer to his request on Friday, August 19, 1960, by rejecting the Union's demand for recognition based upon the filing of the Union petition for an NLRB election (CJA 107).

It should be borne in mind that several employees shortly after they signed Union authorization cards, had

second thoughts about the Union and on their own volition decided to oppose the Union (CJA 50, 102).

The Union thereafter filed charges with the NLRB against the Employer for certain alleged unfair labor practices, including a refusal to bargain charge under Section 8(a)(5) of the National Labor Relations Act. We need not set forth at length the disposition of these charges other than the 8(a)(5) charge since they are not in issue in this petition. We need only state that the reviewing court found the Employer guilty of certain charges (the discharge of one employee and unfair interrogations of its employees), innocent of others (the discharge of another employee and unfair surveillance of union activities), and remanded still others to the Board for further proceedings (the layoff of four employees). Both the Board and the First Circuit, the reviewing court of the NLRB enforcement petition, however, found the Employer guilty of a refusal to bargain. Further, the Board order as enforced by the Court of Appeals for the First Circuit ordered the Employer to bargain with the Union although the only proof of the Union's majority status was the authorization cards signed by a majority of the plant's employees in what was characterized by the First Circuit opinion as a "whirlwind campaign."

Basis of Jurisdiction of Federal Courts

The basis of jurisdiction of the United States Court of Appeals for the First Circuit is Section 10(e) of the National Labor Relations Act quoted in full text below, page 37a.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in conflict with the provisions of the National Labor Relations Act.

As pointed out by this Court in *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953), an order of the National Labor Relations Board is subject to judicial modification unless it meets the requirement of Section 10(c) of the National Labor Relations Act that it "will effectuate the policies of this Act." It is our basic contention that the order herein not only fails to effectuate any policy of the Act but actually thwarts the most fundamental policy of the Act.

In its order, the Board required the Employer to recognize and bargain with the Union. This in effect gives the Union virtually all the rights and benefits of an NLRB certification. The Union is placed in almost exactly the same position as if a majority of the plant's employees had voted for it as their collective bargaining agent in an NLRB election.

To prove this point we need only quote the opinion of this Court in *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702, 704-705 (1944) where this Court set forth the effect of an NLRB order to bargain made as a result of an 8(a)(5) charge.

> "* * * the Board has * * * in this case and in similar cases [adopted] a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. * * *

> "* * * But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."

Thus for this indeterminate period the employees will be obligated to have the Union act as their collective bargaining representative without any opportunity to change this status. Regardless of the effect of such an order on the Employer, it must of necessity have a profound effect on its employees. They will find, regardless of their own wishes and desires, that the Union has been made their spokesman at the collective bargaining table "for a reasonable period" and that the Union has been given all of the power over them and their rights that this implies. And all this without adequate proof, as we will show below, that the Union was a choice of the majority of the employees.

This contrasts with the fundamental policy of the National Labor Relations Act as expressed in Section 7. Section 7 specifically gives employees the right "to bargain collectively through representatives of their own choosing" and "to refrain from any or all of" the activities protected by Section 7. The entire balance of the National Labor Relation Act exists to further these rights. In short, if an order of the NLRB deprives any group of employees of their rights under Section 7 it cannot effectuate the policy of the Act.

In this case however the Board ordered an employer to bargain with a union where the only proof of the union's majority status was that a majority of employees signed authorization cards after a "whirlwind campaign." The natural unreliability of such evidence is heightened by the

fact that several employees had second thoughts about joining the Union almost as soon as they signed the cards (CJA 50, 102) and that throughout the brief Union organizing campaign the employees' minds must have been pre-occupied by the impending dislocations which would be caused by the breakdown of the Brooklyn press.

We will demonstrate below that under the National Labor Relations Act the Board has no power to determine whether or not a union represents a majority of the plant's employees by any other means but a collective bargaining election held under Section 9. But in any event the basic thrust of the First Circuit's opinion is that the inadequacy of this proof of the Union's majority status is outweighed by the unfair labor practices of the Employer. The First Circuit holds that although the Employer could have forced the Union to prove its claim of majority status at a Board election had it been innocent of unfair labor practices, the Employer's guilt removed this right. In effect, this means that the employees' rights are dependent upon the innocence of their employer and their rights could be ordered violated by the Board to punish their employer for violating their rights. Thus the employees would lose their right to bargain collectively through representatives of their own choosing and have to bargain with representatives of the Board's choosing. They would lose their right to refrain from bargaining and would have to bargain collectively whether they wanted to or not whenever the Board desired to punish a guilty employer. Obviously, punishing an employer by abridging the rights of his employees which the Act is designed to protect can in no sense be considered an effectuation of the policies of the Act.

Indeed, the Board's order herein may be an order for the Employer to do precisely what this Court in *International Ladies' Garment Workers Union* v. *NLRB*, 366 U. S. 731 (1961), held to be an unfair labor practice if done by an employer on his own volition—that is to recognize a union not representing a majority of employees as the collective bargaining representative for his employees.

This is not the place to elaborate on the factual inadequacies of the proof of the Union's majority status herein but we must emphasize that any proof of this other than an NLRB election was specifically disapproved by the explicit provisions of the Taft-Hartley Act Amendments to the Wagner Act and their legislative history.

In the original Wagner Act, Section 9(c) read as follows:

> "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or *utilize any other suitable method to ascertain such representatives.*" (Emphasis supplied.)

Under this original wording the Board could use any method it considered suitable to determine majority status of a union. Such cases as *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702 (1944), decided under the Wagner Act, are thus completely inapplicable here, as the NLRB in such cases could rely upon its former power to ascertain majority status by "any other suitable means." Likewise inappli

cable are other cases where the union majority was recognized either by the employer or by Board certification. Still other cases, although decided under the Taft-Hartley Act rather than the Wagner Act, did not consider the changes the Taft-Hartley Act made in Board power.

In 1947, Congress amended the Wagner Act by the Taft-Hartley Act. In doing so, they completely eliminated all other methods of ascertaining majority status *except collective bargaining elections.*

The framers of the Taft-Hartley Act specifically distrusted checks of authorization cards. Thus, in the House Committee Report on the Hartley Bill, Section 9(h) of that bill, which later was adopted verbatim as Section 9(c)(1) of the Taft-Hartley Act, was described as follows:

> "Section 9(h)—The present act does not, by its terms, provide for so-called 'consent elections' but the Board frequently holds them. The bill permits parties to waive hearings before the Board (providing no other interested person intervenes and objects), but when the parties waive a hearing, *the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past.*" (Emphasis supplied.)
>
> House of Representatives Committee Report No. 245, 80th Congress, First Session, Page 39.

This was recognized by the NLRB itself in *General Box Co.*, 82 NLRB 678 (1949) and *Firestone Tire & Rubber Co.*, 76 NLRB 226 (1948).

As pointed out above, the effect of the order herein is to give the Union all the benefits of a certification "for a reasonable period". Thus the NLRB is seeking to do through Section 10(c) what it has been specifically prohibited from doing through Section 9(c). It is selecting a collective bargaining representative without a collective

bargaining election or otherwise consulting the employees' desires except by a complete acceptance of authorization cards obtained through a "whirlwind campaign" under the shadow of a temporary major dislocation in the Employer's business.

We submit that for these reasons the Board's order is in violation of the provisions and intent of the National Labor Relations Act.

2. The decision of the First Circuit is in conflict with decisions of the Second Circuit.

We submit that the Court's decision herein is in conflict with the decision of the Second Circuit in *NLRB* v. *Adhesive Products Corp.*, 281 F. 2d 89 (2nd Cir. 1960). In that case the Court was faced with a similar NLRB order. The Court began its discussion of the problem by asking the only question which can possibly be relevant in considering the validity of any NLRB order.

> "Under these circumstances, what relief is best calculated to give to the employees the right to which they are entitled?" (at page 91).

Its answer, we submit, applies equally well to this case:

> "First, they should not be made the pawns of any union, the company, or of the Board. Second, they should have an opportunity to express their choice in the manner provided by law" (at page 91).

Based upon these guideposts, that Court modified the NLRB order as follows:

> "Keeping in mind the policy of the Act, namely, to encourage bargaining through representatives of the employees' own choosing (Sec. 7) the Board

> and this court should endeavor to make this goal attainable. The most feasible procedure would appear to be that suggested by Judge Learned Hand in NLRB *v.* National Licorice Co. (104 F. 2d 655 (2nd Cir. 1939)) and followed by Judge A. N. Hand in NLRB *v.* American Mfg. Co. (106 F. 2d 61 (2nd Cir. 1939)) namely, * * * to make the order 'conditional upon the Board's ascertaining by a new election whether the union is now the choice of the majority.' In this way the current wishes of the employees can manifest themselves under the aegis of the Board's supervision" (at page 92).

See also *NLRB* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2nd Cir. 1961); *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713 (2nd Cir. 1961); *Perry Coal Co.* v. *NLRB*, 291 F. 2d 126 (7th Cir. 1961).

It is precisely such relief which should have been ordered here so as to prevent the employees at North Walpole from being made "the pawns of the Board."

These decisions were distinguished on their facts by the Second Circuit in *NLRB* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176 (2nd Cir. 1962)[1]—but these attempted distinctions cannot remove the soundness of the reasoning of the *Adhesive Products* case and the cases which followed it. They point out basic considerations which must govern all orders of this type and we submit should be applied herein.

3. This case presents an important question of Federal labor law not previously considered by this Court.

At the oral argument before the First Circuit, counsel for the Board stated that the argument set forth in 1.

1. We have been advised by counsel for Philamon Laboratories, Inc., that he intends to petition for a writ of certiorari in that case.

above based upon the legislative history of the Taft-Hartley Act was being presented to a Court of Appeals for the first time. Thus, this case presents to this Court for the first time the same question, that is whether the Taft-Hartley Act Amendments to Section 9 in effect reversed *Franks Bros. Co. v. NLRB*, 321 U. S. 702 (1944). In any event this Court has never reconsidered its action in *Franks Bros.* after the Taft-Hartley Act amendments.

The importance of this issue in theory is obvious from our discussion in 1. above. Its practical importance can be seen by the large number of cases in which the NLRB attempts to impose orders similar to the one at bar. We submit that the importance of these questions merits a reconsideration by this Court of the entire problem of remedies for §8(a)(5) violations in view of the Taft-Hartley Act amendments, this Court's decision in *International Ladies' Garment Workers Union v. NLRB*, 366 U. S. 731 (1961) and above all the basic philosophy of the NLR Act as a remedial rather than a punitive statute designed to protect employees' rights.

CONCLUSION

For the foregoing reasons this petition for a writ a certiorari should be granted.

Respectfully submitted.

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APPENDIX A

Intermediate Report of the Trial Examiner

STATEMENT OF THE CASE

Charges having been filed and duly served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the above-named Respondent, a hearing involving allegations of unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, was held in Bellows Falls, Vermont, on November 14, 15 and 16, 1960, before the undersigned Trial Examiner.

At the hearing all parties were represented, and were afforded full opportunity to present evidence pertinent to the issues, to argue orally and to file briefs. Oral argument was waived. Briefs have been received from General Counsel and the Respondent.

After the hearing was closed, and pursuant to an understanding reached by the parties at the hearing, a stipulation of fact, relating to certain telephone records, was received by the Trial Examiner. Said stipulation is hereby made a part of the record in these proceedings.

Disposition of the Respondent's motion to dismiss the complaint, upon which ruling was reserved at the hearing, is made by the following findings, conclusions and recommendations.

Upon the record thus made, and from his observation of the witnesses, the Trial Examiner makes the following:

Appendix A

Findings of Fact

I. The business of the Respondent

The Respondent is a New York corporation. Its principal office and place of business is in Brooklyn, New York, with a Division located in North Walpole, New Hampshire, which plant is here involved. At this plant the Respondent is engaged in the manufacture, sale and distribution of extruded, rolled and finished products of magnesium and aluminum alloy and related products.

In the course of its operations at the North Walpole plant the Respondent received materials valued at more than $50,000 annually from points outside the State of New Hampshire, and has shipped products valued at more than $50,000 annually to points outside that State.

The complaint alleges, the answer does not deny, and the Trial Examiner concludes and finds that the Respondent is engaged in commerce within the meaning of the Act.

II. The Charging Union

United Electrical, Radio and Machine Workers of America, Local 218, is a labor organization admitting to membership employees of the Respondent.

III. The unfair labor practices

A. *Setting and issues*

The chief items of conduct claimed by General Counsel to be violative of the Act occurred during the week beginning August 15, 1960. In substance it is his contention that almost immediately upon being confronted with a request for recognition, submitted by a representative of

the Charging Union which at the time represented a majority of the Respondent's employees, the plant manager unlawfully discharged two employee leaders of the organizational movement and laid off four other employees. By such unlawful discrimination and by other interference, restraint and coercion, General Counsel urges, the Respondent also violated Section 8(a)(5) of the Act in refusing to bargain collectively with the Union as the majority representative of all employees in an appropriate unit.

The Respondent's answer merely enters a general denial. At the hearing and through its witnesses the Respondent claimed certain affirmative reasons for its actions which will be discussed below.

B. *Facts*

Because of the interrelationship both of the issues here presented and the pertinent events, the Trial Examiner will summarize in this section and in chronological order certain findings of fact relating to General Counsel's case. Discussion of evidence adduced by the Respondent to support its affirmative claims will be reserved for a later section.

The Trial Examiner finds as follows:

(1) On Monday, August 15, employee Donald Belden met with Organizer Hugh Harley, Jr., of the Charging Union, and from him obtained union authorization cards. He distributed them among the production and maintenance employees during the next 2 days.

(2) The Respondent concedes, and it is found, that on August 15, 16, and 17, eighteen of the employees in a unit

admitted to be appropriate signed cards authorizing the Union to represent them in collective bargaining.

(3) While the record reveals a minor dispute as to whether there were 24 or 25 employees on the payroll in the unit on August 17, there can be no dispute that 18 cards established a majority representation as of that date.

(4) During the lunch period on Wednesday, August 17, many of the employees who had signed cards met and selected a committee of seven to accompany Harley to demand recognition from Plant Manager Records. Donald Belden was selected as chairman of the employee group.

(5) That noon, Harley and the committee went to Records' office. Harley introduced himself as the union representative and Belden as head of the employee committee.

(6) Harley claimed majority representation, and offered to prove this claim by the cards then with him, by a community election, or any other suitable method. He demanded recognition. Records raised no question indicating doubt of such claim, but said he would not grant recognition then. He promised to give Harley his answer the following Friday.[1]

1. The findings as to this interview rest upon the credible testimony of Harley and Belden which in large part is corroborated by Records. For reasons set out at length in a later section, however, the Trial Examiner can place no reliance upon any of the plant manager's testimony. Such unreliability is also made plain by the fact that on direct examination Records admitted that Harley "had cards to show that the UE represented a majority," but on cross-examination, when asked if Harley had cards, he replied: "I would say no. . . . I don't remember" In any event, he finally admitted, in effect, that he had no doubt of the union majority that day.

Appendix A

(7) At the same meeting Harley asked Records not to interfere with the employees' right to organize and the plant manager promised that he would not.

(8) Shortly after Records had given this promise, however, Belden was sent into his office, where the plant manager warned the employee that the Union was Communist and he would be branded for life if he continued in it. Records also insisted that there was no need for a union in the plant, and threatened that if it came in the employees would no longer receive monthly raises and all would have to go through another 30-day trial period. The manager also told Belden that he had "a fairly decent potential" and "had qualities for a good worker." Records obtained Belden's agreement that he would reconsider and would present the manager's point of view to the employee committee which was to meet that night at the home of Sylvester Smith, an employee.

(9) Late the same afternoon Foreman Lemp interrogated employee Benjamin about his union sympathies, and warned him that if the Union got in he thought the plant would close.

(10) That night, having previously been informed where the meeting was to be held, and within a period of some 15 or 20 minutes, Records twice drove slowly by Smith's home, each time looking in.

(11) The next morning, Thursday, August 18, a number of employees informed Belden that Foremen Lemp and Humphrey were calling them aside and interrogating them about the Union. As spokesman for the union committee Belden went into Records' office and protested against

this conduct which the manager had promised would not be engaged in.

(12) Records gave the employee this reply only: "Do you realize you are jeopardizing your job by coming in here?" He ordered the employee back to work.

(13) Later during that day Harley returned to the office, asked for but was denied permission to have Belden accompany him, and then voiced his protest against Records' failure to comply with his promise of the day before. He again asked for recognition. Records denied that there had been any interference, and told Harley he would get his answer on recognition the following day.

(14) Also on Thursday employee Benjamin went in to ask Records for a raise. Records told him that if the Union got in "there wouldn't be but one raise a year."

(15) The same day Foremen Humphrey and Lemp interrogated employee LaDuke regarding his feeling about the Union. Lemp told him that if he would vote "no," they would be "better off in the shop," and warned that if "the Union comes in" they would be working only 8 months a year. Lemp asked the employee to give him his answer that night.

(16) Late that afternoon both Donald Belden and Sylvester were summarily and without previous warning discharged, and employees Maurice Brodeur, Clinton Pecor, Roland Prouty and Bernard Smith were laid off until further notice.

(17) As noted heretofore, Belden was the employee leader of the organization—admittedly known to be such

Appendix A

by Records. Sylvester Smith was on the employee committee and it was by his house which Records had driven slowly the night before, an act of surveillance. Employees Peeor, Prouty and Bernard Smith were on the employee committee which had been in Records' office Wednesday noon. Although Brodeur was not a member of the committee, he had signed a union card and had recently been employed at a nearby plant which had been organized by the same union local.

(18) These six employees (except Prouty, who was not a witness) were told upon their discharge or layoff, as follows:

> a. Belden was first asked by Records: "Do you remember what I told you early this morning about jeopardizing your job?" Belden conceded his recollection. Records then said: "As of this moment you are fired." He gave the employee two reasons: "(1) you haven't been attending to your work and (2) . . . you falsified your application form." The plant manager then ordered Foreman Humphrey to escort Belden off the premises within 10 minutes and not to permit him to return to the shop.
>
> b. Sylvester Smith, the first employee hired by the Respondent when opening the plant in the late fall of 1959, was told as he came from the toilet by Plant Engineer Wickberg to "keep on going"—out of the shop. When Smith asked why, Wickberg replied that he was spending too much time in the toilet and his work was unsatisfactory. As the two proceeded to the office, apparently to get the employee's discharge check, Wickberg said: "You know what Mr. Lawson (general manager of the Respondent) said about the union business? . . . His first words were, 'Ha, Ha, Ha!'"

Appendix A

c. Bernard Smith, who had told Records that morning that he would continue to "go along" with the others despite the manager's efforts to dissuade him, was merely informed by Foreman Lemp that he was laid off "due to production."

d. Maurice Brodeur, also laid off by Lemp, was told by this foreman "we are cutting production" and while he was satisfied with his work he had "got to lay" him off. The foreman added, "Probably, when this blows over, they will hire you back."

e. Clinton Pecor, upon being laid off by Lemp, was told it was "due to things that are happening here."[2]

(19) On Friday, August 19, Foreman Lemp asked employee Shafer while at work what he thought of the Union. Shafer evaded the question. Lemp then told him that if the Union came in the employees would have to pay the cost of insurance then being borne by the Company. The foreman also told Shafer: "I hate to fire anybody, but when I get the word from the bigger boss, I got to do it. You see what happened here yesterday." He also said there were "7 or 8 people out on the street now that would vote for the Union."

(20) Also on Friday Records told employee A. Fair that if the Union came in the employees would get but one raise a year, and asked him to change his mind about the organization.

2. Lemp was not a witness, and all remarks attributed to him are uncontradicted. Plant Engineer Wickberg, a witness, did not dispute Smith's account of the discharge interview, although he gave a somewhat different version which the Trial Examiner does not credit.

Appendix A :

(21) At noon that day when Harley returned for Records' answer to his demand for recognition, the plant manager dismissed him by refusing recognition and pointing out that the organizer had provided his own answer by filing a petition with the Board for an election.

C. *Conclusions*

The foregoing facts, based upon credible testimony largely unchallenged or undisputed, establish a *prima facie* case supporting all allegations of the complaint and which, in the opinion of the Trial Examiner, may successfully be counterpoised only by a most convincing presentation of credible evidence warranting other conclusions.

In quick summiary, the Respondent would have it found that: (1) Belden was discharged because he "falsified" his application for employment several weeks' earlier: (2) Sylvester Smith was discharged because he had been an unsatisfactory employee ever since he had been employed; and (3) the four layoffs were made necessary because of an accident at the Brooklyn plant on August 15, where certain materials were prepared for shipment to the New Hampshire plant and assembly there.

By a considerable measure, in the opinion of the Trial Examiner, the Respondent has failed to provide the necessary counterbalance to General Counsel's case on each of the issues.

As to the layoffs, the testimony of General Manager Lawson and Plant Manager Records is not only mutually contradictory on essential points but lacks support in company records. The following examples of contradiction are noted:

Appendix A

(1) Lawson testified that following an accident to a Brooklyn press the morning of August 15 he telephoned to Records and instructed him to "cut his immediate work force 25 per cent." Records, however, has flatly denied that Lawson so instructed him.[3]

(2) Records testified that Lawson "knows every single person up here" and that through him "tries to be acquainted with the individuals and skills of the people up here in North Walpole." Lawson, however, declared: "I don't know the situation with respect to the qualifications of the individuals."

As to company records—or documents purporting to be such (no primary records were produced at the hearing) the Trial Examiner is at a loss to determine which of two documents, if either, is correct and accurate. Both were prepared by the Respondent, one being submitted to the Regional Office before the hearing and the other introduced by the Respondent at the hearing. Variances are not minor, as the following comparison shows. The items purport to be the total poundage of "extrusions" received at the North Walpole plant from Brooklyn during the months noted:

	General Counsel's Ex. 4	Resp. Ex. 3
June	33,284	44,711
July	36,738	43,330
August	25,463	21,398

3. It would appear to be difficult to conceive of a more direct denial than here quoted from Records' testimony:

Q. For that matter, didn't Mr. Lawson tell you on Monday to reduce the force by 25 percent?
A. No.
Q. Didn't he?
A. No.

Appendix A

It appears to be Lawson's claim that because of the breakdown at Brooklyn, no more than 40,000 pounds of "extrusions" could be provided monthly to New Hampshire for some months after August 15. Since one set of figures produced by the Respondent shows that in neither of the two preceding months, had the receipts attained this figure, it cannot be reasonably maintained, in the opinion of the Trial Examiner, that a reduction in force was required to assemble 40,000 pounds.

Finally, Lawson admitted that there was no reduction in force at the Brooklyn plant, where the accident occurred.

The Trial Examiner concludes and finds that there is no merit to the Respondent's claim that the accident made necessary reduction in force at the New Hampshire plant and that this was the reason for the layoff of the four employees.

As to Sylvester Smith, it appears needless to review in detail the plainly exaggerated and colored testimony of both Records and Wickberg regarding their dissatisfaction with him. According to them he had been a poor workman and wholly unsatisfactory ever since he had been hired. He was the first employee at this plant, and it is undisputed that he had received two raises within the period of somewhat less than a year of his employment. Both Records and Wickberg finally admitted that Smith had *never* been warned or cautioned that unless he did better work he would be either discharged or suspended. Under such circumstances, the Trial Examiner finds no merit in the Respondent's contentions as to Smith.

As to Belden, only Records testified as to the claimed reason for his discharge. The manager's insistence that he had taken this action because of "falsification" of the

employee's application for employment appeared early in his testimony to have some degree of merit. While examination of the document, in evidence, shows that "falsification" is an unduly strict characterization, it is established, and Belden did not dispute the fact, that he accredited himself with some 2 years more of military service than he actually had. He did *not* "falsify," but merely left blank, a portion of the application calling for a listing of "arrests." Connotation of the word is not in issue here, however, but only Records' testimony as to what he did about it.

The manager repeatedly stated that during the few weeks of Belden's employment he had queried local insurance and real estate agents, a police chief and a judge, concerning "rumors" of Belden's character and past. Although he said it had "occurred" to him to ask the employee himself, he admitted that he had never done so. Finally, he claimed, he telephoned to a Vermont probation officer in a nearby town, on the morning of *August 16*, and learned from this official that the young man (only 23) was on probation from an offense committed in the State of New Hampshire sometime before his employment by the Respondent. Records was not only emphatic in his claim that this telephone call was made on August 16, but insisted that the information he then received caused his immediate decision to discharge Belden.

None of Records' testimony regarding his previous "investigation" has the slightest corroboration in the evidence. J. V. Moeykens, probation officer called as a rebuttal witness by General Counsel, admitted that someone at the plant had called him, but he could not accurately fix the date.

Appendix A

As a witness Records attempted to bolster his recollection of the precise date by testifying that he had a diary which contained an entry refreshing his recollection. The diary was not produced.

Shortly before the hearing closed General Counsel applied for a subpoena calling for telephone records. It was granted. Counsel for both parties then agreed that within a specified period a joint motion for reopening of the hearing would be submitted to the Trial Examiner or a stipulation of fact as to what such records disclosed would be forwarded.

Bearing in mind the obvious point that if Records had in fact made the call on August 16—the day before he had knowledge of Belden's union leadership, the Respondent's contentions as to his discharge might have possessed some merit, the following stipulation is revealing:

> It is hereby stipulated by and between the Counsel for General Counsel and Counsel for Whitelight Products Division of White Metal Rolling and Stamping Corp. that the records of the New England Telephone and Telegraph Company indicate that on Thursday, August 18, 1960 a telephone call was placed from Whitelight Products Division of White Metal Rolling and Stamping Corp., North Walpole, New Hampshire, whose telephone number is Hillcrest 5-5511 to Mr. Julius V. Moeykens, Brattleboro, Vermont, whose telephone number is Alpine 4-5941 at 9:35 A.M. Said telephone call was of nine (9) minutes duration. The above telephone numbers are the respective and only numbers for each party. No other telephone calls were placed between the above two numbers in the month of August.

Appendix A

No motion for reopening the hearing has been received. Further comment upon Records' credibility as a witness appears hardly necessary.[4]

In final summary, the Trial Examiner concludes and finds as follows:

(1) All production and maintenance employees of the Respondent employed at its North Walpole plant, exclusive of office clerical employees, professional employees, guards and all supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(2) On August 17, 1960, and at all times since that date, the Charging Union has been and is now the exclusive representative of all employees in the said unit for the purposes of collective bargaining.

(3) On August 17, 1960, and at all times since then, the Respondent has refused to bargain collectively with the said Union, not only by refusing to recognize it as the representative of its employees but also by its discharge and layoff of the employees named herein and the interference, restraint and coercion herein described.

(4) On August 18, 1960, the Respondent discriminatorily and to discourage membership in the Charging Union discharged and laid off the six employees as found above.

4. The Trial Examiner notes here that he does not believe that either of the Respondent's two counsel—Robert Abelow or his son William—were aware of Records' obvious alteration of dates. Abelow, senior, readily agreed to join in the proposed stipulation as soon as he had an opportunity to check the Respondent's own telephone records—records which of course had been available to Records since August, 1960. In short, the Trial Examiner attributes no bad faith to either counsel.

(5) Under the circumstances found herein, the interrogation of employees as to their union sympathies and the surveillance engaged in by Records constituted coercion within the meaning of Section 8(a)(1) of the Act.

(6) By such interrogation and surveillance, by the threats of reprisals and promises of benefit as described herein, by the discriminatory discharges and layoffs, and by the refusal to bargain with the Charging Union, the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed by the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. United Electrical, Radio and Machine Workers of America, Local 218, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employees, thereby discouraging membership in the

above-named labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. All production and maintenance employees of the Respondent employed at its North Walpole plant, exclusive of office clerical employees, professional employees, guards and all supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since August 17, 1960, the above-named labor organization, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all employees in the said unit, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

5. On August 17, 1960, and at all times since then, the Respondent refused and continues to refuse to bargain collectively with the said labor organization within the meaning of Section 8(a)(5) of the Act.

6. By interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Appendix A

THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take affirmative action to effectuate the policies of the Act.

It will be recommended that the Respondent offer to each of the six employees named herein and found to have been discriminated against immediate and full reinstatement to his former or substantially equivalent employment, and that the Respondent make each of them whole for any loss of pay suffered by reason of the discrimination by payment to him of a sum of money equal to that which he would normally have earned as wages since August 18, 1960, to the date of the offer of reinstatement, less his net earnings during said period and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, the Trial Examiner recommends that Whitelight Products Division of White Metal Rolling and Stamping Corp., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Electrical, Radio and Machine Workers of America, Local 218, or in any other labor organization, by discharging, laying off, refusing to reinstate, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment;

(b) Threatening employees with economic reprisals or promising benefits to discourage membership in any labor organization, or interrogating employees regarding their union membership or activities in a manner violative of Section 8(a)(1) of the Act;

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Trial Examiner finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Electrical, Radio and Machine Workers of America, Local 218, as the exclusive representative of the Respondent's employees in the above-described unit and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer employees Donald Belden, Sylvester Smith, Maurice Brodeur, Clinton Pecor, Roland Prouty and Bernard Smith immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole

for any loss of earnings they may have suffered by reason of the discrimination in the manner set forth above in the section entitled "The Remedy";

(c) Preserve and, upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all records necessary for the determination of the amount of backpay due and the right of reinstatement under terms of these Recommendations;

(d) Post at its plant in North Walpole, New Hampshire, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director for the First Region, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of sixty (60) consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the First Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps it has taken to comply with the foregoing Recommendations.

It is further recommended that, unless within the prescribed period, the Respondent notifies the said Regional Director that it will comply, the National Labor Relations Board issue its order requiring compliance with the aforesaid Recommendations.

Dated at Washington, D. C. January 5, 1961.

(s) C. W. WHITTEMORE
C. W. WHITTEMORE
Trial Examiner

(Appendix to Intermediate Report omitted.)

Appendix A

Decision and Order of the National Labor Relations Board

On January 5, 1961, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and briefs in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.[2]

1. The request by Respondent for oral argument is hereby denied because, in our opinion, the record and the briefs adequately present the issues and the positions of the parties.

2. The Trial Examiner found, and it is herein adopted, that Respondent, through its agent Records, engaged in unlawful surveillance within the meaning of Section 8(a)(1). This violation was not remedied in the recommended order and notice to be posted by Respondent. The General Counsel excepted to this omission. We find merit in the exception and shall therefore amend the order and notice to conform with this finding of violation.

Appendix A

Contrary to the conclusion of the Trial Examiner, we find that the General Counsel failed to meet his burden of proof in establishing that Respondent discharged Donald Belden for a discriminatory reason. In filling out his job application in June, Belden falsified his military experience and the fact that he was not honorably discharged, and left blank the request for information relative to his record for arrests. At the bottom of this page on the application form there appears the following statement:

> The information on this application is accurate and subject to check. I understand that any misleading or incorrect statements may render the application void and would be cause for immediate dismissal in the event of employment.

Although Respondent discharged Belden on the day following the Union's appearance and demand for recognition, the discharge occurred on the very day Respondent confirmed the fact that Belden had an undisclosed criminal record. Absent a showing that Respondent condoned the above noted misrepresentations, in the circumstances here we cannot say that Belden was discharged for other than a valid reason. Accordingly, we shall dismiss that portion of the complaint which alleges a Section 8(a)(3) violation with respect to Belden.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Whitelight Products Division of White Metal Rolling and Stamping Corp., North Wal-

pole, New Hampshire, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Electrical, Radio and Machine Workers of America, Local 218, or in any other labor organization, by discharging, laying off, refusing to reinstate, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment;

(b) Threatening employees with economic reprisals or promising benefits to discourage membership in any labor organization, or engaged in surveillance of employees' union activities, or interrogating employees regarding their union membership or activities in a manner violative of Section 8(a)(1) of the Act;

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

Appendix A

2. Take the following action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Electrical, Radio and Machine Workers of America, Local 218, as the exclusive representative of the Respondent's employees in the appropriate unit described in the Intermediate Report and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer employees Sylvester Smith, Maurice Brodeur, Clinton Pecor, Roland Prouty and Bernard Smith immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination in the manner set forth in the section of the Intermediate Report entitled "The Remedy;"

(c) Preserve, and upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all records necessary for the determination of the amount of backpay due and the right of reinstatement under terms of this Order;

(d) Post at its plant in North Walpole, New Hampshire, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director for the First Region, shall, after being duly signed by the Respond-

3. In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER," the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

ent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of sixty (60) consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the First Region of the National Labor Relations Board, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent violated Section 8(a)(3) of the Act by the discharge of Donald Belden.

Dated, Washington, D. C. Jun 27 1961

FRANK W. McCULLOCH, *Chairman*

PHILIP RAY RODGERS, *Member*

JOHN H. FANNING, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

(Appendix to order omitted.)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5870

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

WHITELIGHT PRODUCTS DIVISION OF
WHITE METAL ROLLING AND STAMPING CORPORATION,
Respondent.

No. 5877

UNITED ELECTRICAL, RADIO
& MACHINE WORKERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR ENFORCEMENT AND ON PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before—WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

MELVIN J. WELLES, Attorney, with whom STUART ROTHMAN, General Counsel, DOMINICK L. MANOLI, Associate General Counsel, and MARCEL MALLET-PREVOST, Assistant General Counsel, were on brief, for National Labor Relations Board.

ROBERT ABELOW, with whom MARSHALL C. BERGER, WILLIAM J. ABELOW, and WEIL, GOTSHAL & MANGES, were on brief, for respondent in No. 5870.

ALLAN R. ROSENBERG for petitioner in No. 5877.

Appendix B

Opinion of the Court

January 15, 1962

ALDRICH, Circuit Judge. These two matters were heard together. The first is a petition for enforcement of a Labor Board order against Whitelight Products Division of White Metal Rolling and Stamping Corp., a New York corporation, hereinafter employer, following a charge by the United Electrical, Radio & Machine Workers of America, hereinafter the union. The second is a petition by the union to review the dismissal of a portion of the complaint. All of the immediately significant events took place in North Walpole, New Hampshire, between Monday and Friday, August 15 to 19, 1960.

For many years employer had operated a mill in Brooklyn, New York. In 1959 it opened a plant in North Walpole to assemble various types of ladders from magnesium extrusions it produced in Brooklyn. Active operation commenced in March 1960. At this time the workers were inexperienced. By August 15 there were some twenty-four employees in the production and maintenance departments, having varying seniority. The morning of that day the largest of the three Brooklyn extrusion presses suffered a serious breakdown, forecasting a production shortage of several months. North Walpole was informed by telephone and advised to make plans for a reduction in personnel. Word of the breakdown spread through the plant. That afternoon one Belden, a production employee, telephoned the union, and on Tuesday and Wednesday morning eighteen of the employees signed authorization

Appendix B

cards. Wednesday noon the union organizer and a committee of the employees, with Belden as chairman, called upon the plant manager and demanded recognition. The Board found that the organizer offered to show the cards, but that the manager's reply was that he would give an answer on Friday. He agreed to take no steps to interfere with the union in the meantime. That afternoon the manager summoned Belden to his office and made some legitimate inquiry about the union, and some that was illegitimate. He was informed that there would be a meeting of the committee at the home of one Smith that evening. That evening he twice drove by Smith's house. His testimony as to his reasons for doing so was not specifically contradicted or impeached.

On Thursday morning the manager engaged in what the trial examiner found to be highly improper vocal anti-union activity. Thursday afternoon he discharged Belden and Smith, and laid off four other employees. Five of these six were members of the committee. That same day the union filed a petition for certification. On Friday the manager stated that since the union had requested an election, this was its "answer," and that he would not recognize the union without the election. The union then filed the present charges, dismissing the certification proceedings.

After a three-day hearing the trial examiner found that the employer had discouraged membership in the union in violation of section 8(a)(3), had refused to bargain in accordance with 8(a)(5), and had engaged in unfair labor practices within the meaning of section 8(a)(1). He recommended an order compelling the employer to bargain with the union and to reinstate the two discharged and

four laid-off employees with back pay. The Board affirmed all findings, except as to Belden. Before us the employer criticizes many of the findings and all of the conclusions, and particularly attacks the order that it should bargain with the union in the absence of any prior certification. The union complains because the trial examiner's finding in favor of Belden was rejected by the Board.

The underlying basis for the trial examiner's decision was his opinion that the plant manager's testimony was wholly unreliable. In large measure we are not unsympathetic with that determination, but we believe that the examiner allowed his not unnatural distaste to get the better of his judgment. This caused him to disregard what seem to us inescapable facts, and to make findings either not supported by the evidence or in some instances contrary thereto. However, we cannot at all accept the employer's contention that it engaged in no improper activities. To do so we would have to say that the Board, as matter of law, must treat statements such as there will be no merit raises if the union comes in, and instead of monthly raises a single raise once a year which will be five cents, and that the plant would operate only eight months instead of twelve, as benign observations of fact. There is no evidence that they had any factual basis. The employer overestimates our credulity.[1]

1. The employer seems correct with respect to one small matter of no particular importance except that it was reflected in the proposed order. We agree that the finding of "surveillance" of the Wednesday evening meeting was something blown up out of proportion. The examiner found that the manager "drove slowly by [twice], each time looking in." No one testified he looked in. One of the two witnesses who saw him pass stated that he appeared to be "just driving around waiting for somebody." This was not evi-

Appendix B

Furthermore, the Board was warranted in finding that the manager's refusal to recognize the union on Wednesday, when it offered the card check, was a violation of section 8(a)(5). *NLRB v. Hamilton*, 10 Cir., 1955 220 F.2d 492; *NLRB v. Scott & Scott*, 9 Cir., 1957, 245 F.2d 926. It did not cease to become such by the union's filing a certification petition, or by its dismissing it. *NLRB v. Kobritz*, 1 Cir., 1951, 193 F.2d 8; *NLRB v. Sunrise Lumber & Trim Corp.*, 2 Cir., 1957, 241 F.2d 620, *cert. den.* 355 U.S. 818. Even bona fide doubts by the employer, which the Board did not find, that this was a "true" majority, rather than the result of a "whirlwind campaign" which would not be the final, considered view of its employees, are not the sort of doubts that would permit a failure to deal in the meantime. *NLRB v. Lorrora*, 5 Cir., 1949, 172 F.2d 293. This latter claim is particularly hollow coming from an employer who sets up a whirlwind campaign of its own, comprised of substantial unfair labor practices.

In the face of a long history of decisions to the contrary, the employer takes the position that ordering it to bargain with a union which has not been certified or recognized, as matter of law thwarts, rather than effectuates, the policies of the Act. It is true that in *International Ladies Garment Workers' Union v. NLRB*, 1961, 366 U.S. 731, the court held that it was an unfair labor practice even in good faith to recognize and bargain with a union which

dence of apprehension. There was no contradiction of the testimony that this was a street on which it was natural to be. In the case which the Board cites, *NLRB v. Vermont American Furniture Corp.*, 2 Cir., 1950, 182 F.2d 842, there was a substantial surveillance which the Board found was for the purpose of discovering the identity of the active employees. Here the manager had already been given this information. On the record before us there is no reason for interpreting this casual passing as surveillance.

proved not to represent the majority of the employees. In that case, as in this one, there was no competing union, but the court held that the actions of the union and the company deprived the employee majority of its right not to be represented. There is a substantial factual difference here where eighteen of the twenty-four employees had signed cards. The employer's seeming solicitude for those who wanted to "refrain" from unionization, based on an unproven suspicion that a majority would conclude to do so after they had realized their precipitancy, cannot change black into white. It has been held that even where the employer's suspicions afterward prove correct, in that the union lost its majority without any other inducement or activity on the part of the employer, the Board may still remedy the employer's unfair labor practice in initially refusing to bargain with the displaced union by an order to do so. *NLRB* v. *Armco Drainage & Metal Products, Inc.*, 6 Cir., 1955, 220 F.2d 573, *cert. den.* 350 U.S. 838; *NLRB* v. *Stow Mfg. Co.*, 2 Cir., 1954, 217 F.2d 900, *cert. den.* 348 U.S. 964; *but cf. NLRB* v. *Adhesive Products Corp.*, 2 Cir., 1960, 281 F.2d 89; *NLRB* v. *Superior Fireproof Door & Sash Co.*, 2 Cir., 1961, 289 F.2d 713. This is part and parcel of the doctrine that the employer must be governed by the situation as it exists at the moment. *Cf. International Ladies Garment Workers' Union* v. *NLRB, supra.* The employees' right to refrain from joining any union cannot be twisted into a right on the part of the employer to say, when they do join, that they did not really mean it. *Cf. NLRB* v. *Geigy Co.*, 9 Cir., 1954, 211 F.2d 553. *A fortiori*, the employer cannot avoid an order to deal with the union by asserting its loss of majority when that loss (if it occurred at all) followed

unfair labor practices by the employer directed to that very end. *NLRB v. Hamilton, supra.*

We turn to more specific matters. The trial examiner found that the discharges of Belden and Smith on Thursday were unfair labor practices. The finding as to Smith was fairly warranted, and requires no discussion. The Board reversed as to Belden. We will treat this subsequently.

The examiner found that the layoff of three of the remaining committee members and one other was a further unfair labor practice. The employer counters by saying that these layoffs were because of anticipated loss of basic material from the Brooklyn mill due to the breakdown of the extrusion press, and that each of these four employees was the junior in point of service in his respective department. It was known from the beginning that repair of the press would take months. In point of fact it required nine. As we read the trial examiner's report, recognizing his obligation to weigh the employer's explanation, *NLRB v. Whittin Machine Works*, 1 Cir., 1953, 204 F.2d 883, he did so by meeting it head on by a determination that no layoffs were necessary. He gave three reasons. The first was a certain difference in testimony between the North Walpole manager and the responsible official in Brooklyn. This difference existed. Possibly it was relevant to the exact timing of the layoffs, but we see no other relevancy. The examiner's finding was not rested on the timing.

2. If there had been a finding based upon the employer's choosing that particular Thursday, we might have supported it. However, such a conclusion would have involved disputed questions of fact. We will not resolve them ourselves. Consequently, we cannot support a finding based on another ground simply because it could have rested on this one. Furthermore, this change of ground might affect

Appendix B

Secondly, the examiner noted discrepancies in the figures relating to previous shipments from the Brooklyn plant. Even resolving all discrepancies against the employer does not, in our opinion, support the examiner's conclusion. Thirdly, the examiner found that it was "admitted that there was no reduction in force at the Brooklyn plant." Even were this true, we would see no possible relevance. However, there was in fact no such admission. On the contrary, the undisputed evidence was that in Brooklyn there was one layoff, and that five employees and two supervisors left and were not replaced. But of paramount importance, ignored by the examiner, is the fact that in addition to the two discharges and four layoffs at North Walpole now in question, four other employees left and were not replaced. The finding that production did not warrant any layoffs, not only is without support, but is totally contradicted. Whether the layoffs were nevertheless an unfair labor practice for some other reason may be given further consideration by the Board.

The final matter is the discharge of Belden. Belden had been employed 2½ months. In his application for employment he represented that he had been honorably discharged from the Air Force after four years' service. In fact he had served fourteen months, and his discharge had been less than honorable, possibly dishonorable. He left blank the answer to the question, "Records of all arrests (date, place of arrest, offense charged, disposition of case):" although agreeing that "any misleading or any

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the relief: If these men, lacking seniority in their jobs, were about to be laid off legitimately, anyway, they are not now entitled to full back pay. *Cf. NLRB* v. *Corning Glass Works*, 1 Cir., 1961, 293 F.2d 784.

incorrect statements . . . would be cause for immediate dismissal. . . ." In fact he had been in a reform school for one conviction of breaking and entering and was on probation following a second. The employer discovered the falsity of the military history shortly before August 15 and received information sufficient to pursue the other matter. On August 18 it learned the facts as to the criminal record.[3] The trial examiner found that Belden's misrepresentations and criminal record were a pretext for his discharge, and that the real reason was his chairmanship of the union committee. The Board, however, concluded, "We cannot say that Belden was discharged for other than a valid reason."

It is reasonable to believe that any employer would want to discharge Belden, not just for his rather significant criminal record, which might be overlooked if he was a good probationer, but for his deceit, which gave added testimony to the continued moral risk. We think the trial examiner treated this matter too lightly. At the same time it is not altogether easy to agree with the Board's quoted language. In the light of the discharge of Smith it might seem reasonable to infer that Belden would have been discharged even if no legitimate reason existed. On the other hand it has been held that some valid reasons are so strong as to override any other. *NLRB* v. *Hudson Pulp & Paper Corp.*, 5 Cir., 1960, 273 F.2d 660; *but cf. NLRB* v. *James-*

[3] Actually, the manager testified in great detail that he learned of the criminal record on August 16 and made up his mind on that date that Belden should be discharged. The purpose of this testimony was to support the claim that the discharge was unconnected with the union's activities, which were unknown on August 16. The complete falsity of this testimony was established by the telephone company's records.

town Sterling Corp., 2 Cir., 1954, 211 F.2d 725. In this case we do not feel that we must make fine distinctions, nor explore the degree to which we may reverse findings of the Board. The Board asks that if we reverse as to Belden we do not require that it order financial relief and reinstatement because of the unreasonableness of requiring the employer to re-employ him. Under the circumstances we think justice will be adequately accomplished by not disturbing the Board's finding.

In No. 5870 a decree will be entered enforcing the order of the Board except as to the provision with respect to surveillance and except as to the four laid-off employees. The case is returned to the Board with respect to said employees for further proceedings not inconsistent with this opinion.

In No. 5877 a decree will be entered denying the petition to review and set aside.

APPENDIX C

Applicable Provisions of the National Labor Relations Act

Section 7, 29 USC, §157, 49 Stat. 452, as amended by 61 Stat. 140:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .".

Section 8, 29 USC, §453, 49 Stat. 452 as amended by 61 Stat. 140:

"(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)".

. . .

Section 9, 29 USC §159, 49 Stat. 453 as amended by 61 Stat. 143:

Appendix C

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

* * *

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board -

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the

Appendix C

Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof . . .

. . . "

Section 10, 29 USC 160, 49 Stat. 453 as amended by 61 Stat. 146:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce . . .

. . . "

"(c) . . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

. . . "

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are on vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order

and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any,

for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28".